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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION**

J. DOE 1, et al.,
 Individual and Representative Plaintiffs,
 v.
 GITHUB, INC., et al.,
 Defendants.

Case Nos. 4:22-cv-06823-JST
 4:22-cv-07074-JST

**PLAINTIFFS' RESPONSE IN
 OPPOSITION TO DEFENDANTS
 OPENAI, INC.; OPENAI, L.P.; OPENAI
 GP, L.L.C.; OPENAI STARTUP FUND
 GP I, L.L.C.; OPENAI STARTUP FUND
 I, L.P.; AND OPENAI STARTUP FUND
 MANAGEMENT, LLC'S MOTION TO
 DISMISS**

Date: May 4, 2023
 Time: 2:00 p.m.
 Courtroom: 6, 2nd Floor
 Judge: Hon. Ion Tigar

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I. INTRODUCTION

Plaintiffs' Class Action Complaint (the "Complaint") alleges with the requisite specificity how Defendants, among other things, misused Plaintiffs' computer code. Plaintiffs published the code, pursuant to open-source licenses. Defendants took that code without any regard to the terms of those licenses. As set forth with specificity in the Complaint, Defendants, rather than use Plaintiffs' code subject to the terms of the licenses under which they were published, instead trained their artificial intelligence products Codex and Copilot on that code, and then designed Codex and Copilot to either ignore or to filter out any attribution, copyright notices, or copies of the license as the open-source licenses require. Codex and Copilot's output, frequently a copy of the Plaintiffs' code, is then sold and marketed to Defendants' customers without any compensation to Plaintiffs. This has resulted in significant harm to Plaintiffs, and they seek relief in the form of damages and injunctive relief.

The OpenAI Defendants challenge Plaintiffs' Complaint on several grounds, but all fall flat. OpenAI argues that Plaintiffs failed to adequately plead concrete and particularized injury sufficient to establish Article III standing. This is incorrect. In addition to violations of statute, Plaintiffs have pleaded injuries analogous to long-recognized harms cognizable at common law, establish particularized injury to themselves including actual and present injuries and imminent future harms, and have standing to sue for injunctive relief. OpenAI also disputes Plaintiffs' ability to proceed pseudonymously. In so doing, OpenAI omits Plaintiffs' efforts to proceed under the terms of a mutually agreed-upon protective order which would permit Plaintiffs to proceed without subjecting themselves to real and specific threats of physical violence. OpenAI also alleges that Plaintiffs have failed to satisfy the notice requirements of Federal Rule of Civil Procedure 8(a)(2).

With respect to OpenAI's substantive arguments, OpenAI's objections to Plaintiffs' claims under the Digital Millennium Copyright Act are unavailing. Plaintiffs make out each element of a Section 1202(b) violation, and Defendants' arguments to the contrary are attempts to read in requirements found nowhere in Section 1202(b). To the extent OpenAI disputes Plaintiffs' state law and common law allegations, these arguments too are misplaced. Plaintiffs'

Complaint has provided ample allegations sufficient to satisfy *Twombly*.

II. FACTUAL BACKGROUND

Defendants are in the business of developing AI systems. *See* ¶¶ 44, 47.¹ Codex and Copilot are both artificial intelligence programs that, by using statistical models, attempt to simulate human reasoning. ¶¶ 2, 8, 46. OpenAI began development of Codex in 2015 and released Codex on a limited basis in August 2021. ¶ 44. GitHub began development of Copilot in 2019 and released Copilot on a limited basis in June 2021. ¶ 45. GitHub released it on a paid subscription basis in June 2022. *Id.* Microsoft acquired GitHub in 2018. ¶ 22.

While corporate ownership is hidden from public view, Copilot appears to be a joint venture between GitHub and OpenAI, and Codex is the product that “powers” Copilot. ¶¶ 22, 47, 66. OpenAI received significant startup funding from Microsoft. ¶¶ 6, 132. In addition, Microsoft eventually procured from OpenAI an exclusive license for OpenAI’s GPT-3 language model, the basis for their AI products. In June 2021, GitHub and OpenAI launched the Copilot program through a self-described joint venture. ¶ 8.

Copilot works by using the code posted to GitHub and learning from that data to produce code itself. ¶¶ 82–83. It does so based on OpenAI’s Codex, which is an AI model. ¶¶ 66, 84, 241. Like other AI products, Codex and Copilot rely on “training,” which is the process by which an AI program can “learn” how to anticipate and provide solutions to coding issues by processing large amounts of data. ¶¶ 10 & n.2, 46, 76. GitHub maintains a website named GitHub.com that allows coders to create and share coding projects under open-source licenses. ¶ 21. As stated by Defendants themselves, Codex and Copilot were trained on code available on GitHub repositories. ¶¶ 82–83.

Unlike human programmers, AI such as Codex and Copilot function by predicting based on the training data the most likely solution to a given input. ¶ 79. They detect statistically significant patterns in the training data and provide output based on these patterns. ¶ 81. As a result, Copilot regularly outputs verbatim copies of materials it was trained on, i.e., it makes

¹ “¶ ___” and “App’x ___” citations are to the Class Action Complaint, Case No. 22-cv-07074, ECF No. 1 unless otherwise indicated.

identical copies of underlying code that was used as training data. ¶¶ 46, 60, 74, 87–90. Indeed, GitHub has admitted that Copilot reproduces verbatim copies of code at least 1% of the time. ¶ 90. This likely vastly understates the actual frequency. ¶ 91.

When a coder creates a project on GitHub, they are offered suggested licenses that they can place on their code to govern its use by others. ¶ 34 & n.10. These licenses contain requirements such as attribution of authorship, inclusion of the copyright notice, and inclusion of the copyright’s text as conditions of the code’s use. *Id.* Plaintiffs utilized these licenses when producing their own code. ¶¶ 19, 20. Plaintiffs then published their code to GitHub pursuant to the rights and obligations outlined in GitHub’s Terms of Service and Privacy Statement. ¶¶ 4, 19, 20, 216.

Codex and Copilot were intentionally trained to omit the information included in the licenses. ¶ 80. This is intentional because early iterations of Copilot reproduced license text. ¶ 94. Indeed, even in July 2021, when Copilot was near its initial launch, it would still sometimes reproduce license text, attribution, and copyright notices, albeit sometimes inaccurately. ¶ 95. Defendants then took further steps to ensure that license text, attribution, and copyright notices were no longer produced as output by Copilot. ¶¶ 94–95. Now, when Codex or Copilot output code, it produces the code without any of the above-mentioned information, such as attribution, even if otherwise producing a near or exact copy of copyrighted code. ¶¶ 46, 87, 90–91, 147–161, 174. This is not by accident, but by design. ¶¶ 94, 95.

III. ARGUMENT

“[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations[.]” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Rule 8(a) requires only a “short and plain statement” of facts supporting a claim. Fed. R. Civ. P. 8(a); *see Twombly*, 550 U.S. at 569 n.14, 570. The statements alleged in the complaint must provide “the defendant[s] fair notice of what . . . the claim is and the grounds upon which it rests.” *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1141 (N.D. Cal. 2009) (citations omitted); *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (“Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.”) (citation omitted). In weighing a

1 motion to dismiss under Rule 12, the court must accept all allegations in the complaint as true.
 2 *See McShannock v. JP Morgan Chase Bank NA*, 976 F.3d 881, 886–87 (9th Cir. 2020) (“All
 3 allegations of material fact are taken as true and construed in the light most favorable to the
 4 nonmoving party.”). Further, the allegations should be evaluated holistically, not piecemeal. *See*
 5 *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). “Dismissal ‘is proper
 6 only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a
 7 cognizable legal theory.’” *Neo4j, Inc. v. Graph Found., Inc.*, No. 5:19-cv-06226-EJD, 2020 WL
 8 6700480, at *2 (N.D. Cal. Nov. 13, 2020) (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.
 9 2001)). This same standard applies to allegations of standing. *See Associated Gen. Contractors of*
 10 *California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983); *see also Warren*
 11 *v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003) (at the pleading stage, a plaintiff
 12 “need only show that the facts alleged, if proved, would confer standing upon him”);
 13 *Knevelbaard*, 232 F.3d at 989–90 (same).

14 **A. Plaintiffs Have Established Article III Standing**

15 In order to establish Article III standing, a “[p]laintiff must have (1) suffered an injury in
 16 fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to
 17 be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). “To
 18 establish injury in fact, a plaintiff must show that he or she suffered ‘an invasion of a legally
 19 protected interest’ that is ‘concrete and particularized’ and ‘actual and imminent, not conjectural
 20 or hypothetical.’” *Id.* at 339 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

21 OpenAI maintains that Plaintiffs have failed to establish Article III standing. Defendants
 22 only challenge that Plaintiffs have not shown injury-in-fact. Specifically, OpenAI contends that
 23 Plaintiffs have not asserted how they specifically were harmed. OpenAI Br., § IV.A.1. OpenAI is
 24 wrong. Plaintiffs have alleged facts giving rise to concrete injury of the kind long recognized under
 25 the common law as well as injuries particularized to them sufficient to confer Article III standing.
 26 Article III does not demand the specificity OpenAI demands.

1. Plaintiffs Have Demonstrated Injury-in-Fact

a. Plaintiffs Have Alleged a Concrete Injury-in-Fact

OpenAI asserts that Plaintiffs show no standing because “the complaint contains no allegation or explanation of whether and how any Plaintiff was harmed.” Open AI Br. at 5. It is black letter that the injury need not be tangible. “A ‘concrete’ injury may include tangible or intangible harms, so long as they ‘actually exist’ and are ‘‘real,’’ and not ‘‘abstract.’’’” *I.C. v. Zynga, Inc.*, 600 F. Supp. 3d 1034, 1046 (N.D. Cal. 2022) (quoting *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021)). In considering standing, “courts should assess whether the alleged injury to plaintiff has a ‘close relationship’ to a harm ‘traditionally’ recognized as providing a basis for a lawsuit in American courts.” *TransUnion*, 141 S. Ct. at 2204 (quoting *Spokeo*, 578 U.S. at 341); *see also id.* (recognizing as sufficient under Article III physical harms, monetary harms, and intangible harms which “include, for example, reputation harms, disclosure of private information, and inclusion upon seclusion.”). The inquiry focuses on “whether plaintiffs have identified a close historical or common-law analogue for their asserted injury . . . but does not require an exact duplicate in American history or tradition.” *Id.* “Congress’s views may [also] be ‘instructive.’” *Id.* (quoting *Spokeo*, 578 U.S. at 341).

Plaintiffs broadly allege invasions of their property and contractual rights—rights that have long been types of injury recognized by the common law and the American legal system. *See Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137–38 (1939); *see also Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 799 (2021) (collecting cases where common law property rights recognized to cause concrete harm). Plaintiffs allege that they stored their software code on GitHub. ¶¶ 19–20. Plaintiffs created this code and published it subject to certain open-source licenses. *Id.* In disregard of those licenses, Defendants then used Plaintiffs’ code as training data for the Codex AI. ¶ 10. Defendants designed Codex to reproduce the code without attribution and sell Copilot output, in violation of those open-source licenses. ¶¶ 82–83. Particularly pertinent here, courts have long recognized a common law right of authors and creators to maintain control of the fruits of their creative labor, protected from the taking or

misappropriation of others.² Indeed, Plaintiffs made their code available with open-source licenses, which include common terms such as the requirement of attribution of authorship, notice of copyright, and a copy of the license itself. ¶¶ 1, 4, 77, 152, 173, App’x A. Codex and Copilot produce output from the licensed material without regard for the terms of the license. ¶¶ 46, 87, 90–91, 147–161, 174. This deprives class members of not only the intrinsic value of attribution, but other recognized benefits of open-source licenses such as future career opportunities and increasing reputation and authority of the author. *See Jacobsen v. Katzer*, 535 F.3d 1373, 1378–79 (Fed. Cir. 2008) (explaining the value of open-source licenses) These injuries are analogous to those for which the common law permits redress.

Further, Congress may add additional legal rights and particularized harm to those developed in the common law. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) (“Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.”); *see also TransUnion*, 141 S. Ct. at 2204–05. As demonstrated more fully below, Plaintiffs have alleged concrete injury under the Digital Millennium Copyright Act, 17 U.S.C. §§ 1201–1205 (the “DMCA”) and other statutes and laws.

b. Plaintiffs Have Shown Particularized Injury

OpenAI argues that Plaintiffs do not have standing to bring their claims because “Plaintiffs do not allege that Copilot or Codex reproduced *their* code or disclosed *their* personal information.” Open AI Br. at 5 (*italics in original*). OpenAI raises this as a standing issue, arguing Plaintiffs have not identified any injury to themselves. OpenAI asserts that Plaintiffs have failed to establish particularized injury.

² *See, e.g., Holmes v. Hurst*, 174 U.S. 82, 86 (1899) (“The nature of this property is perhaps best defined by Mr. Justice Erle in *Jefferys v. Boosey*, 4 H. L. Cas. 815, 867: ‘The subject of property is the order of words in the author’s composition, not the words themselves; they being analogous to the elements of matter which are not appropriated unless combined, nor the ideas expressed by those words, they existing in the mind alone, which is not capable of appropriation.’”); *Stephens v. Cady*, 55 U.S. 528, 531 (1852) (“Lord Mansfield observed, in *Millar v. Taylor* [4 Buss. 2303 (1769)] that ‘no disposition, no transfer of paper upon which the composition is written, marked, or impressed, (though it gives the power to print and publish,) can be construed a conveyance of the copy, (by which he means copy-right, as appears from a previous part of his opinion,) without the author’s express consent “to print and publish,” much less against his will.’”).

1 A particularized injury “must have been suffered directly by the individual plaintiff, and it
 2 must be distinct from the more general type of objection that members of the public at large
 3 might have to a defendant’s unlawful conduct.” *In re Facebook, Inc., Consumer Priv. User Profile*
 4 *Litig.*, 402 F. Supp. 3d 767, 786 (N.D. Cal. 2019) (“*Facebook User Profile*”) (citing *Spokeo*, 136 S.
 5 Ct. at 1548). “[A] plaintiff’s knowledge that he or she is exposed to a risk of future . . . harm could
 6 cause its own current emotional or psychological harm” sufficient to establish a particularized
 7 injury. *TransUnion*, 141 S. Ct. at 2211 n.7; *see also Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143
 8 (9th Cir. 2010) (finding Article III standing when plaintiffs “had alleged an act that increased
 9 their risk of future harm”) (citations omitted).

10 Plaintiffs have alleged the requisite particularized injury. Plaintiffs, who each published
 11 code under open-source licenses (*e.g.*, ¶¶ 19–20), allege that Defendants have violated provisions
 12 of those open-source licenses. As specifically alleged, those licenses require, among other things,
 13 attribution of authorship, notice of copyright and a copy of the license. ¶¶ 64, 77–79, 173, App’x
 14 A. It is well-established that open sources licenses are enforceable and that violations of open-
 15 source licenses constitute cognizable injury sufficient to confer standing. *See Jacobsen v. Katzer*,
 16 609 F. Supp. 2d 925, 932 (N.D. Cal. 2009) (explaining that the Federal Circuit in reversing the
 17 district court’s prior decision “opines that damage to the ‘creation and distribution of
 18 copyrighted works under public licenses’ could include injury to reputation and the
 19 programmers’ recognition in his profession as well as impact on the likelihood that the product
 20 will be further improved.”) (citing *Jacobsen*, 553 F.3d at 1379); *Ubiquiti Networks, Inc. v. Cambium*
 21 *Networks, Inc.*, No. 18 C 5369, 2019 WL 2208435, at*3 (N.D. Ill. May 22, 2019) (rejecting
 22 argument seeking dismissal “on the ground that the GPL and other open source software licenses
 23 deprives [plaintiff] of ‘standing’ to enforce its copyright and contract rights.”). This is cognizable
 24 injury.

25 Defendants attempt to dodge responsibility because Copilot anonymizes and conceals the
 26 violations of the license terms Plaintiffs challenge here. As specifically alleged, by operation of the
 27 product, it makes it difficult or impossible to prove that the licensed materials belong to any
 28 particular licensor. *See* ¶¶ 153, 156. Moreover, as conceded by Defendants, Copilot reproduces

1 exact copies of Plaintiffs’ code that was used as training data. ¶¶ 90–91. Because Copilot is built
 2 atop Codex, its copying is also attributable to OpenAI. ¶ 84. Given the number of times users may
 3 use Copilot, it is a virtual certainty any particular plaintiff’s code will be displayed either with
 4 copyright notices removed or in violation of Plaintiffs’ open-source licenses for profit. *See*
 5 *Facebook User Profile*, 402 F. Supp. 3d at 787 (finding Article III standing where “Facebook
 6 disseminated sensitive user information . . . to tens of thousands of app developers and business
 7 partners” and that “it is virtually inevitable that some of these companies obtained information
 8 on the named plaintiffs.”); *see also In re Apple Inc. Device Performance Litig.*, 50 F.4th 768, 781–82
 9 (9th Cir. 2022). Even in the privacy context, where there is no license, that is sufficient. *See*
 10 *Facebook User Profile*, 402 F. Supp. 3d at 787 (“This type of privacy invasion is no less an Article
 11 III injury simply because the plaintiffs are left to guess precisely which companies . . . were
 12 involved.”).

13 Plaintiffs also allege an imminent and significant harm—now that their software code is
 14 part of the training data of Codex and Copilot, their code can be output at any time without the
 15 legally necessary notices and attribution, leading to increased and imminent risk of
 16 misappropriation. Courts have deemed similar harms sufficient to confer standing. *See, e.g.,*
 17 *Clemens v. ExecuPharm Inc.*, 48 F.4th 146, 153 (3d Cir. 2022) (rejecting a rule that “would require
 18 plaintiffs to wait until they had sustained an actual injury to bring suit”) (citing *Susan B. Anthony*
 19 *List v. Driehaus*, 573 U.S. 149, 158 (2014)); *In re Sony Gaming Networks & Customer Data Sec.*
 20 *Breach Litig.*, 996 F. Supp. 2d 942 (S.D. Cal. 2014).

21 Defendants rely on *In re iPhone Application Litig.*, No. 11-MD02250-LHK, 2020 WL
 22 4403963, at *4 (N.D. Cal. Sep. 20, 2011). In *iPhone Application*, the plaintiffs “d[id] not identify
 23 what iDevices they used, do not identify which Defendant (if any) accessed or tracked their
 24 personal information, do not identify which apps they downloaded that access/track their
 25 personal information, and do not identify what harm (if any) resulted from the access or tracking
 26 of their personal information.” *Id.* In contrast, Plaintiffs here set forth in detail what information
 27 was taken (the Licensed Materials, ¶¶ 144, 173), the means by which it was taken (by scraping and
 28 collection by Copilot, ¶¶ 78–82, 193), and what was done with the code (Copilot was trained on

and reproduced Plaintiffs' code without attribution in derogation of the Licenses, ¶¶ 13, 83-90). These allegations, taken as true, are sufficient to establish standing.

2. Plaintiffs Have Standing to Sue for Injunctive and Declaratory Relief

A "person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial." *TransUnion*, 141 S. Ct. at 2210 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013)). Article III requires that the future harm cannot be based on a speculative chain of potential future injury. *See Clapper*, 568 U.S. at 415; *Krottner*, 628 F.3d at 1142. Plaintiffs, however, need not "demonstrate that it is literally certain that the harms they identify will come about." *Clapper*, 568 U.S. at 414 n.5. Here, among other things, Plaintiffs allege the fact of the open-source licenses and the imminent risk their code and other material subject to the licenses will be displayed to third parties without attribution. *See, e.g.*, ¶¶ 83-90. That is sufficient. *See Connectus LLC v. Ampush Media, Inc.*, No. 8:15-cv-2778-T-33 JSS, 2017 WL 1155448, at *4 (M.D. Fla. Mar. 28, 2017) (finding standing where complaint alleges "Defendants had been scraping, digitally copying or otherwise misappropriating Plaintiff's proprietary Lead generation data").

B. Plaintiffs Should be Permitted to Proceed Anonymously

OpenAI next claims that Plaintiffs have failed to demonstrate why they need to proceed anonymously. OpenAI Br. at 6. "To determine whether to allow a party to proceed anonymously when the opposing party has objected, a district court must balance five factors: '(1) the severity of the threatened harm, (2) the reasonableness of the anonymous party's fears, . . . (3) the anonymous party's vulnerability to such retaliation,' (4) the prejudice to the opposing party, and (5) the public interest." *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Est.*, 596 F.3d 1036, 1042 (9th Cir. 2010). Plaintiffs have met this burden and should be permitted to proceed anonymously.

First, Defendants misstate the record to press for strategic advantage to deny Plaintiffs their day in court. They demand dismissal of Plaintiffs' complaint without disclosing Plaintiffs' willingness from the outset to provide their true names to Defendants under the terms of a

1 protective order.³ Saveri Decl., ¶ 6. It was Defendants’ suggestion that Plaintiffs proceed under a
 2 stipulated protective order. *Id.*, ¶ 7. Nonetheless, months ago in late 2022, when Plaintiffs
 3 provided a draft protective order to Defendants for consideration and were met with silence. *Id.*
 4 Plaintiffs again sought to discuss a protective order in January 2023, and were again rebuffed. *Id.*,
 5 ¶ 8 & Ex. 4. Given the continued silence, Plaintiffs then filed a motion to have their proposed
 6 protective order entered by this court. ECF No. 49. Only then did the parties come to agreement
 7 on a Stipulated Protective Order. Saveri Decl., ¶ 11.

8 Plaintiffs recognize that proceeding anonymously is unusual. But the circumstances
 9 justify it. Plaintiffs filed under pseudonyms because they reasonably feared they would be subject
 10 to threats of retaliation and violence. Unfortunately, those fears were well-founded. Plaintiffs,
 11 though their counsel, have received legitimate and credible threats of physical violence.⁴ Saveri
 12 Decl., ¶¶ 3–5 & Exs. 1–3. These threats are not merely anonymous postings on internet forums.
 13 They were specific threats sent directly to Plaintiffs’ counsel. *See, e.g., id.* Nothing about the
 14 threats from their context “demonstrates frustration, a joke, or political commentary instead of a
 15 true intent to harm.” *Kamehameha Sch.*, 596 F.3d at 1044 (citing *Watts v. United States*, 394 U.S.
 16 705, 706–07 (1969)). One message states: “I literally hope someone murder you.” Ex. 2. Mere
 17 days after Plaintiffs filed their initial Complaint, Plaintiffs’ counsel received the following
 18 message: “go f*****g cry about github you f*****g piece of s**t n****r, I hope your throat gets
 19 cut open and every single family member of you is burnt to death.” *Id.*, Ex. 3 (alterations added).
 20 Plaintiffs’ counsel have received many similar messages.

21 These threats are neither trifling nor benign. Unlike in *Kamehameha Schools*, the threats
 22 are not accompanied by any statements opposing violence. 596 F.3d at 1044; *see also* Saveri Decl.,
 23 Exs. 1–3. These circumstances justify allowing Plaintiffs to proceed pseudonymously. *See, e.g.,*
 24 *United States v. Doe*, 655 F.2d 920, 922 n.1 (9th Cir. 1981) (using pseudonym because appellant

25
 26 ³ OpenAI claims Plaintiffs promised to file a motion regarding proceeding pseudonymously.
 27 OpenAI Br. at 7 n.5. Plaintiffs only stated “[w]e are prepared to make the requisite showing to the
 28 Court.” Jacobs Decl., Ex. 2. Plaintiffs have made that showing here in this response.

⁴ Indeed, the threats of physical violence predate the filing of Plaintiffs’ initial complaint. Saveri
 Decl., ¶¶ 3–5 & Exs. 1–3.

“faced a serious risk of bodily harm” if his identity were disclosed); *Doe v. UNUM Life Ins. Co. of Am.*, 164 F. Supp. 3d 1140, 1147 (N.D. Cal. 2016).

Lastly, Defendants face no prejudice. As promised, Plaintiffs have disclosed their identities to Defendants under the terms of the Stipulated Protective Order. (ECF No. 63). Saveri Decl., ¶ 12. Defendants have all they need to investigate Plaintiffs and their claims. And, as noted above, what prejudice they may have incurred could have been avoided simply by meeting and conferring with Plaintiffs as counsel for Defendants originally suggested.

C. Plaintiffs Have Alleged Facts Particularized to OpenAI to Meet the Notice Requirement of Rule 8(a)(2).

OpenAI argues that the Complaint lumps together multiple defendants failing to meet the notice requirement of Rule 8(a)(2). *See* OpenAI Br. at 7–8. But Plaintiffs allege facts particularized to each OpenAI entity sufficient to meet Rule 8(a)(2)’s low notice requirement.

OpenAI mischaracterizes the Complaint and ignores explicit allegations regarding each Defendant. “[U]nder the federal rules a complaint is required only to give . . . notice of the claim such that the opposing party may defend himself or herself effectively.” *Starr v. Baca*, 652 F.3d 1202, 1212 (9th Cir. 2011); *see also Adobe Sys. Inc. v. Blue Source Grp., Inc.*, 125 F. Supp. 3d 945, 964 (N.D. Cal. 2015) (citations omitted). This burden is low. *See In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F. Supp. 2d 896, 904 (N.D. Cal. 2008). Plaintiffs have met it here. For each Defendant, Plaintiffs allege specific acts attributable to that Defendant or an agency relationship that renders that Defendant liable for the conduct of other Defendants. A parent can be held vicariously liable for acts of a subsidiary if an agency relationship exists. *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1239 (N.D. Cal. 2004), abrogated on other grounds, as recognized by *Icon Lab, Inc. v. Bausch Health Cos., Inc.*, 828 F. App’x 373 (9th Cir. 2020) (citing Restatement (Second) of Agency § 14M). Plaintiffs have satisfied the notice requirement or Rule 8(a)(2).

OpenAI concedes that Plaintiffs have alleged that OpenAI, L.P. and OpenAI, Inc. participated directly in the programming, training, and maintenance of Codex, an integral part of Copilot. ¶¶ 23–24. This is sufficient to put Defendants on notice of the claims against them for

1 their direct participation and actions. *See Adobe Sys. Inc.*, 125 F. Supp. 3d. at 965 (“Put another
 2 way, the gravamen of Adobe’s allegations in the instant lawsuit are that all the Defendants
 3 infringed on Adobe’s trademarks and copyrights The Court finds that such allegations
 4 provide sufficient notice.”) (internal quotation marks omitted).

5 Plaintiffs’ claims against the OpenAI entities also proceed based upon an agency theory.
 6 As distinguished from a claim based on alter ego or veil piercing, “[w]here one corporation is
 7 controlled by another, the former acts not for itself but as but as directed by the latter, the same
 8 as an agent, and the principal is liable for the acts of its agent within the scope of the agent’s
 9 authority.” *Bowoto*, 312 F. Supp. 2d at 1234 (quoting *Pac. Can Co. v. Hewes*, 95 F.2d 42, 45-46
 10 (9th Cir. 1938)); accord *Stickerath v. Globalstar, Inc.*, 527 F. Supp. 2d 992, 1002 (N.D. Cal. 2007)
 11 (“[A corporate parent] may be held liable if . . . “the subsidiary acts as the general agent of the
 12 parent.”). In order to establish the agency relationship, ““(1) there must be a manifestation by
 13 the principal that the agent shall act for him; (2) the agent must accept the undertaking; and (3)
 14 there must be an understanding between the parties that the principal is to be in control of the
 15 undertaking.”” *Bowoto*, 312 F. Supp. 2d at 1239 (N.D. Cal. 2004).

16 Plaintiffs allege OpenAI, L.P. participated directly in the creation of Copilot and offers it
 17 jointly with GitHub, Inc. ¶ 24. OpenAI, Inc. is alleged to have had control over all the other
 18 OpenAI entities, including OpenAI, L.P., meaning it is liable for OpenAI, L.P.’s conduct under
 19 an agency theory. ¶ 23; *E. & J. Gallo Winery v. EnCana Energy Servs., Inc.*, No. CVF03-5412 AWI
 20 LJO, 2008 WL 2220396, at *11 (E.D. Cal. May 27, 2008). Plaintiffs specify the control embodied
 21 in the corporate structure and investment relationships. Plaintiffs allege that each of the OpenAI
 22 entities participate in the management and direction of OpenAI and exercise sufficient control
 23 over OpenAI, L.P. to be held liable for its conduct in creating and distributing Copilot and Codex.
 24 ¶¶ 25-28.

25 Plaintiffs’ allegations are sufficient to establish the other OpenAI entities “exercise[]
 26 such a degree of control over [their] subsidiary [OpenAI, L.P.] that the subsidiary can
 27 legitimately be described as only a means through which the parent acts,” which is sufficient for
 28 liability under an agency theory. *E. & J. Gallo Winery*, 2008 WL 2220396, at *11; *Sun*

Microsystems Inc. v. Hynix Semiconductor Inc., 622 F. Supp. 2d 890, 899 (N.D. Cal. 2009) (finding “concepts of day to day control as a touchstone” of determining agency). Determination of whether agency is established is a highly fact-specific inquiry and not suited for resolution on the pleadings. *Agricola Baja Best, S. De. R.L. de C.V. v. Harris Moran Seed Co.*, 44 F. Supp. 3d 974, 982–83 (S.D. Cal. 2014) (denying summary judgment on issue of agency) (citing *Bowoto*, 312 F. Supp. 2d at 1235). Plaintiffs have described the ownership and investment relationships of the OpenAI entities with specificity; that they managed the debts and obligations of OpenAI L.P.; that they were aware of and controlled OpenAI L.P.; and that they invested and controlled OpenAI L.P. to develop, sell and market Codex and Copilot. *E.g.*, ¶¶ 126–32. This is sufficient on a motion to dismiss.⁵ See *Friche v. Hyundai Motor, Am.*, No. SACV 21-01324-CJC (ADSx), 2022 WL 1599868, at *5 n.4 (C.D. Cal. Jan 28, 2022) (holding that under Rule 9, “[p]rior to discovery, Plaintiff cannot be expected to know the precise relationship between the members of the . . . corporate family”); see generally *Capacitors*, 106 F. Supp. 3d at 1066 (rejecting need “to explain each defendant’s own, unique role.”). Plaintiffs’ allegations satisfy Rule 8(a)(2).

D. Plaintiffs Have Plausibly Pled Claims for Violation of the Digital Millennium Copyright Act Against All Defendants (17 U.S.C. § 1202(b))

Generally, Section 1202(b) of the DMCA imposes liability for removing or altering copyright management information (“CMI”).⁶ 17 U.S.C. § 1202; *Murphy v. Millennium Radio Grp., LLC*, 650 F.3d 295, 305 (3d Cir. 2011). Section 1202(c), which describes protected categories of CMI, has been interpreted broadly—courts have interpreted PDF file names,⁷

⁵ Notably, the six OpenAI defendants filed a joint brief and treat themselves as one contiguous entity except in the portion challenging the sufficiency of Plaintiffs’ allegations against certain OpenAI entities. See generally *Capacitors*, 106 F. Supp. 3d at 1066.

⁶ Section 1202(c) provides, in pertinent part, “[a]s used in this section, the term ‘copyright management information’ means any of the following information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form, except that such term does not include any personally identifying information about a user of a work or of a copy, phonorecord, performance, or display of a work[.]”

⁷ *Energy Intel. Grp., Inc. v. Kanye Andersen Cap. Advisors, L.P.*, 948 F.3d 261, 276-77 (5th Cir. 2020) (“PDF file names can be CMI”).

copyright headers,⁸ License.txt files,⁹ and portions of code itself¹⁰ to constitute CMI as encompassed by Section 1202(c). *See Williams v. Cavalli*, No. CV 14-06659-AB JEMX, 2015 WL 1247065, at *3 (C.D. Cal. Feb. 12, 2015); *Leveyfilm, Inc. v. Fox Sports Interactive Media, LLC*, 999 F. Supp. 2d 1098, 1102 (N.D. Ill. 2014). The pleading burden under the DMCA is low. *See Mollman v. Zoetop Bus. Co.*, No. CV 22-4128 (PA) (GJSx), 2022 WL 17207103, at *3 (C.D. Cal. Sep. 16, 2022) (burden is “not as exacting” at the pleading stage).

“Knowledge or intent on the part of the defendant is required for liability under . . . § 1202(b).” *Merideth v. Chicago Trib. Co., LLC*, No. 12 C 7961, 2014 WL 87518, at *2 (N.D. Ill. Jan. 9, 2014). As long recognized by the Ninth Circuit, “direct proof of one’s specific wrongful intent is rarely available” and such knowledge or intent can be inferred through circumstantial evidence. *Friedman v. Live Nation Merch., Inc.*, 833 F.3d 1180, 1189 (9th Cir. 2016) (internal quotation marks omitted). “[I]ntent, knowledge, and other conditions of a person’s mind may be alleged generally” for purposes of pleading Section 1202(b)’s mental state requirements. *Logan v. Meta Platforms, Inc.*, ___ F. Supp. 3d ___, 2022 WL 14813836, at *9 (N.D. Cal. Oct. 25, 2022) (citations omitted). Further, “[n]othing in § 1202 of the DMCA suggests that registration is a precondition to a lawsuit. While a copyright registration is a prerequisite under 17 U.S.C. § 411(a) for an action for copyright infringement, claims under the DMCA are, however, simply not copyright infringement claims and are separate and distinct from the latter.” *Med. Broad. Co. v. Flaiz*, No. CIV.A. 02-8554, 2003 WL 22838094, at *3 (E.D. Pa. Nov. 25, 2003).

Conduct is prohibited under the DMCA without regard for whether the copyrighted information has been infringed. *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 950–52 (9th Cir. 2010) (rejecting infringement nexus requirement for DMCA claims). Because a DMCA claim does not require proof of infringement, fair use is not a defense. *See Murphy v. Millennium*

⁸ *ICONICS, Inc. v. Massaro*, 192 F. Supp. 3d 254, 272 (D. Mass. 2016).

⁹ *Neo4j, Inc. v. Graph Found., Inc.*, No. 5:19-cv 06226-EJD, 2020 WL 6700480, at *5 (N.D. Cal. Nov. 13, 2020).

¹⁰ *Bounce Exch., Inc. v. Zeus Enter., Ltd.*, No. 15-cv-3268 (DLC), 2015 WL 8579023, at *3 (S.D.N.Y. Dec. 9, 2015).

Radio Grp., Civil Action No. 08-1743 MAS, 2015 WL 419884, at *5 (D.N.J. Jan. 30, 2015). Even where the underlying infringement may be deemed fair use, that does not shield the conduct from liability under the DMCA. *Id.* (“A claim under § 1202(b) does not necessarily attack non-infringing fair uses of copyrighted works—it targets conduct that does harm to identifying information that helps to protect the copyright holder, such as CMI.”); *see also Diamondback Indus., Inc. v. Repeat Precision, LLC*, No. 4:18-CV-902-A, 2019 WL 5842756, at *2 (N.D. Tex. Nov. 7, 2019) (“a DMCA action under section 1202(b) is not an action for infringement”).

1. Plaintiffs Have Pleaded All of the Elements of a Section 1202(b) Violation

“Section 1202(b)(1) provides: ‘No person shall, without the authority of the copyright owner or the law . . . intentionally remove or alter any copyright management information . . . knowing, or . . . having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any’” copyright.” *Stevens v. Corelogic, Inc.*, 899 F.3d 666, 673 (9th Cir. 2018). To succeed on a claim for “removal or alteration of [CMI]” under Section 1202(b)(3), “[a] plaintiff must thus prove the following: (1) the existence of CMI in connection with a copyrighted work; and (2) that a defendant distributed works or copies of works; (3) while knowing that CMI has been removed or altered without authority of the copyright owner or the law; and (4) while knowing, or having reasonable grounds to know that such distribution will induce, enable, facilitate, or conceal an infringement.” *Mango v. BuzzFeed, Inc.*, 970 F.3d 167, 171 (2d Cir. 2020) (citations and quotation marks omitted); *see also Stevens*, 899 F.3d at 673.

Existence of CMI. As Plaintiffs allege, all the Licensed Materials are posted with licenses that include at least three types of CMI: (1) the name of the owner; (2) a copyright notice, and (3) the terms of the applicable license. *See, e.g.*, ¶¶ 34 n.4, 56, 77. Each of these categories of CMI are recognized as such under Section 1202(c). *See* 17 U.S.C. § 1202(c)(2); (3); (6). As alleged, the CMI is provided with the associated code when hosted on GitHub, including in the licenses. ¶¶ 4, 19–20, 93; *see also Neo4j*, 2020 WL 6700480, at *3 (finding liability under § 1202(b) where CMI was “conveyed in a ‘LICENSE.txt’ file in connection with each source code file”).

Distribution of Copied Works. Plaintiffs have alleged Defendants distributed copies of the Licensed Materials. For example, as conceded by Defendants, Codex often reproduces exact

copies of Plaintiffs' code that was used as training data. ¶¶ 90–91. Because Copilot is built atop Codex, Copilot's copying is also attributable to OpenAI. ¶ 84.

Knowing Removal of CMI. Plaintiffs allege that “Defendants intentionally removed or altered CMI from the Licensed Materials after they were uploaded to one or more GitHub repositories.” ¶ 148. According to a GitHub blog post:

“In one instance, GitHub Copilot suggested starting an empty file with something it had even seen more than a whopping 700,000 different times during training—that was the GNU General Public License.” . . . As GitHub explains: “GitHub Copilot *has* changed to require a minimum file content. So **some of the suggestions flagged here would not have been shown by the current version.**”

¶ 94 (second emphasis added). Defendants then took steps to ensure that CMI was no longer reproduced in connection with output. First, Copilot was trained to ignore the author name, copyright notice, and license terms associated with its training data, though it could have maintained and shared this information, as it did earlier. *Id.* As Copilot still continued to reproduce some CMI despite Defendants' efforts, it was altered to prevent the output of certain content, such as the terms of open-source licenses. ¶ 95. In other words, Defendants knew Copilot was copying and reproducing CMI as output and then intentionally designed Copilot to stop outputting CMI, either by ignoring CMI, or filtering out CMI from output. As Defendants admit that Codex “powers” Copilot, which OpenAI trained, both Defendants knew Copilot was removing CMI. ¶¶ 47, 84. A conclusion to the contrary would adopt a competing inference, forbidden under Rule 8. *Knevelbaard*, 232 F.3d at 984.

Knowingly Enabling Infringement. Finally, Defendants knew or had reasonable grounds to know that their distribution would induce, enable, facilitate, or conceal an infringement. “[A] defendant's awareness that distributing copyrighted material without proper attribution of CMI will conceal *his own* infringing conduct satisfies the DMCA's second scienter requirement.” *Mango*, 970 F.3d at 172; *see also id.* (“Section 1202(b)(3) also encompasses ‘an infringement’ that, upon distribution, ‘will . . . conceal’ the fact of *that* infringement”). This so-called second scienter element is evidenced by the GitHub Copilot Terms, which state: “GitHub does not claim any rights in Suggestions, and you retain ownership of and responsibility for Your Code, including Suggestions you include in Your Code.” ¶ 218, Ex. 1 at p. 38. This claim that Copilot's

output is “owned” by the Copilot user that elicits them induces Copilot users to believe they can use that output in any way they choose, including in ways that disregard or ignore Plaintiffs’ licenses. ¶ 77. In addition, by falsely claiming the output belongs to the Copilot user that elicits it, Defendants conceal their own prior infringement.

Besides GitHub’s explicit terms, it is reasonable to infer that Defendants, who are in the business of creating, producing, and investing in AI, knew that when a user sought an output from Copilot (and Codex), Copilot was often reproducing copied code without CMI. Each time Copilot displayed copied code without CMI, it would lead Copilot users to infringe on Plaintiffs’ copyright interests. Courts have deemed similar allegations sufficient under Rule 8. *See GC2 v. Int’l Game Tech.*, 391 F. Supp. 3d 828, 842 (N.D. Ill. 2019) (“reasonable to infer that the defendants—companies engaged in producing and distributing online games—knew that each time they updated or launched a game . . . they reuploaded the entire game library, thereby causing the unlawfully removed or manipulated [CMI] to again be distributed to the public” and defendants “should have known that their unlicensed distribution of artwork missing [CMI] to their customers could lead their customers to infringe [plaintiff’s] copyrights”). Plaintiffs’ allegations are sufficient to infer a pattern of conduct indicating Defendants’ knowledge of future infringement. Plaintiffs have satisfied all the requirements for their claims under Sections 1202(b)(1) and 1202(b)(3).

a. Section 1202(b) Does Not Require the Copy to be “Identical”

OpenAI appears to argue that a claim under Section 1202(b) must be based on an “identical” copy of a work. OpenAI Br. at 9–10. But Section 1202(b) has no such requirement.

This case is about code published subject to open-source licenses. Courts have recognized that code itself can include CMI. *ICONICS*, 192 F. Supp. 3d at 272 (copyright headers “comprised of relatively human-readable text at the top of a file of code” which includes a statement the material is confidential and then “provide[s] the name of the original author of the file” is “paradigmatic CMI”); *Bounce Exch.*, 2015 WL 8579023, at *3 (“Weaving CMI into the text of the source code may be among the most efficient or security-enhancing ways to include CMI with that code.”). The “copy” need not include the entire underlying work. *ICONICS*, 192

F. Supp. 3d at 272 (“[T]he definition of CMI neither states nor implies that CMI can only exist with regard to the full version of a work.”). Courts have allowed a Section 1202(b) claim when CMI that was incorporated into the work is removed. *E.g., ICONICS*, 192 F. Supp. 3d at 273 (finding liability under Section 1202 where defendant “deleted source code headers from at least two files that he copied”); *Bounce Exch.*, 2015 WL 8579023, at *2–4.

Defendants contend, in effect, that the statute simply cannot apply to collaborative or derivative works. The court in *GC2*, 391 F. Supp. 3d 828, rejected the argument. *Id.* at 844–45. The defendants in *GC2* relied on *Faulkner Press, L.L.C. v. Class Notes, L.L.C.*, 756 F. Supp. 2d 1352, 1359 (N.D. Fla. 2010), and others for the proposition that removal liability is inappropriate where a defendant creates a “different product” using “materials from” a plaintiff’s unattributed copyrighted materials. But as the *GC2* court noted, there is no support for this contention:

[None of the] cases cited by the defendants stands for the broad proposition that derivative or collaborative works are categorically excluded from protection under the DMCA’s provision for removal of copyright management information. Indeed, the “original work” language on which the defendants precariously rest their entire argument does not even appear in the statute. Rather, it is entirely a product of district court opinions focused on different language in provision.

391 F. Supp. 3d at 843–844. This reasoning applies with equal force here.

To the extent anything close to an “identical” copy is required to establish any or all DMCA claims, Plaintiffs’ allegations meet that measure.¹¹ Plaintiffs allege the Licensed Materials were incorporated into Copilot itself in their entirety. ¶¶ 147–51. Plaintiffs allege that

¹¹ Defendants cite to *Dolls Kill, Inc. v. Zoetop Bus. Co.*, No. 22-cv-01463-RGK-MAA, 2022 WL 16961477, at *4 (C.D. Cal. Aug. 25, 2022); *Kirk Kara Corp. v. W. Stone & Metal Corp.*, No. CV-20-1931-DMG (EX)2020 WL 5991503, at *6 (C.D. Cal. Aug. 14, 2020); and *Frost-Tsuji Architects v. Highway Inn, Inc.*, No. CIV. 13-00496 SOM, 2015 WL 263556, at *2 (D. Haw. Jan. 21, 2015). But *Dolls Kill*, *Kirk Kara*, and *Frost-Tsuji* each dealt with works which could have been reproduced independently *without removing or altering* CMI. *E.g., Frost-Tsuji Architects v. Highway Inn, Inc.*, No. CIV. 13-00496 SOM, 2014 WL 5798282, at *5 (D. Haw. Nov. 7, 2014) (“‘Virtually identical’ plans could have been created by redrawing [plaintiffs]’s plans and not including [the plaintiff]’s [CMI]”); *Kirk Kara*, 2020 WL 5991503, at *6 (“Defendant did not make identical copies of Plaintiff’s works *and then remove the engraved CMI.*”) (emphasis added). Further, none of the cases Defendants cite deal with computer code.

Copilot’s output is often essentially identical to Licensed Materials. *E.g.*, ¶ 46 (“the Output is often a near-identical reproduction of code from the training data.”), ¶ 87 (“Copilot regularly Output’s verbatim copies of Licensed Materials.”); *see also* ¶ 74.

b. Plaintiffs Need Not Show the Copied Work Was Not Fair Use

OpenAI suggests Plaintiffs must allege facts sufficient to defeat a potential fair use defense. OpenAI Br. at 11–12. This is wrong. While the doctrine of fair use applies to a copyright claim, it does not pertain to claims under the DMCA. *Murphy*, 2015 WL 419884, at *5–6 (“A claim under § 1202(b) . . . targets conduct that does harm to identifying information that helps to protect the copyright holder, such as CMI.”); *see also Diamondback Indus.*, 2019 WL 5842756, at *2 (holding that DMCA claim is not predicated on infringement claim). And even if fair use pertains—which it does not—it is an affirmative defense and therefore not subject to *Plaintiffs’* pleading requirements under Rule 8(a) but *Defendants’* under Rule 8(c). *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (explaining fair use is an affirmative defense).

c. Plaintiffs Have Identified Works From Which CMI Was Removed

OpenAI also claims that “Plaintiffs have not sufficiently identified any works from which CMI was allegedly removed.” OpenAI Br. at 10. As OpenAI acknowledges, however, the Complaint is replete with examples from which CMI has been altered or removed. *E.g.*, ¶¶ 87, 89. OpenAI rehashes their argument that none of the examples provided in the Complaint are *Plaintiffs’* own code, which, as demonstrated above, is the incorrect inquiry. *See* § III.A, *supra*.

d. Defendants Wrongly Claim that Plaintiffs “Fail[ed] to Adequately Plead Scierter”

Defendants claim that “Plaintiffs have not alleged facts sufficient to establish a substantial risk that any copyright infringement has occurred or that any future infringement is likely because of the removal of CMI, nor that any of the OpenAI Entities had reason to know of any such likelihood.” OpenAI Br. at 11. OpenAI primarily relies on *Stevens v. Corelogic, Inc.*, 899 F.3d 666 (9th Cir. 2018) for the proposition that “the plaintiff must provide evidence from which one can infer that future infringement is likely, albeit not certain, to occur as a result of the removal or alteration of CMI.” OpenAI Br. at 11 (citing *Stevens*, 899 F.3d at 675).

OpenAI ignores Plaintiffs’ well-pleaded allegations. Based on Plaintiffs’ allegations it is reasonable to infer that Defendants both “knowingly” or “intentionally” created Copilot with either the “intent to” or “knowledge, or . . . having reasonable grounds to know” that Copilot would “induce, enable, facilitate, or conceal” infringement. 17 U.S.C. § 1202(b); *see also* § III.D.1, *supra*. For example, Defendants admit that Copilot creates identical copies of code at least 1% of the time. ¶ 90. Even if this figure were accurate, the only way Defendants could know this is if Defendants knew that Copilot copies original works from its training data. Defendants can reasonably be inferred to know that users of Copilot will receive code without the required licenses and CMI. *See FurnitureDealer.Net, Inc. v. Amazon.com, Inc.*, No. 18-232 (JRT/HB), 2022 WL 891473 at *25 (D. Minn. Mar. 25, 2022) (“A plaintiff can demonstrate actual or constructive knowledge by showing a past ‘pattern of conduct’ or ‘modus operandi’ that the defendant was aware of or had reasonable grounds to be aware and which put defendant on notice of the probable future impact of its actions.”) (citing *Stevens*, 899 F.3d at 674). Further, it is reasonable to infer that Defendants, who are in the business of creating, producing, and investing in AI, knew that each time Copilot was used, it was reproducing copied code without CMI, and would lead Copilot users to infringe on Plaintiffs’ licenses. These allegations are sufficient. *See GC2*, 391 F. Supp. 3d at 842 (“reasonable to infer that the defendants—companies engaged in producing and distributing online games—knew that each time they updated or launched a game . . . they reuploaded the entire game library,” they “should have known that their unlicensed distribution of artwork missing [CMI] to their customers could lead their customers to infringe [plaintiff’s] copyrights”). Accepting competing inferences would violate Rule 8.¹²

E. Plaintiffs Have Properly Alleged State Law Claims Against OpenAI

Defendant OpenAI joins Defendant Microsoft/GitHub in arguing that Plaintiffs have not pleaded facts sufficient to sustain their state law claims. OpenAI raises unique arguments as to

¹² Further, *Stevens* was decided on summary judgment, and applied a more stringent standard than that applied on the pleadings; *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116 (C.D. Cal. 1999) was likewise decided on summary judgment. *Id.* at 1122. Plaintiff’s burden is “not as exacting” here. *See Mollman*, 2022 WL 17207103, at *3; *see also Sims v. Amazon.com, Inc.*, No. 2:20-cv-04389-FLA (ASx), 2022 WL 739524, at *8 (C.D. Cal. Jan. 27, 2022).

1 Plaintiffs’ negligence and civil conspiracy claims. Plaintiffs reiterate that these state law claims are
 2 not preempted by the Copyright Act, as each of Plaintiffs’ state and common law claims are each
 3 qualitatively different from a claim under the Copyright Act. *See* Plaintiffs’ Opposition to
 4 Defendant Microsoft’s Motion to Dismiss, § III.E.1.

5 **1. Plaintiffs Have Plausibly Pled a Claim for Negligence (Count X)**

6 To prove a claim for negligence in California, a plaintiff must establish: (1) the defendant
 7 had a duty, or an “obligation to conform to a certain standard of conduct for the protection of
 8 others against unreasonable risks,” (2) the defendant breached that duty, (3) that breach
 9 proximately caused the plaintiff’s injuries, and (4) damages. *Corales v. Bennett*, 567 F.3d 554, 572
 10 (9th Cir. 2009). Plaintiffs satisfy each of these elements.

11 Open AI claims that Plaintiffs have failed to allege any Open AI entity owed a duty to
 12 Plaintiff. OpenAI Br. at 22. California courts consider several factors when deciding whether a
 13 duty of care exists, including “the foreseeability of harm to the plaintiff, the degree of certainty
 14 that the plaintiff suffered injury, the closeness of the connection between the defendant’s
 15 conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy
 16 of preventing future harm, the extent of the burden to the defendant and the consequences to the
 17 community of imposing a duty to exercise care with resulting liability for breach, and the
 18 availability, cost, and prevalence of insurance for the risk involved.” *Bass v. Facebook, Inc.*, 394 F.
 19 Supp. 3d 1024, 1039 (N.D. Cal. 2019) (quoting *Regents of Univ. of Cal. v. Superior Court*, 4 Cal.
 20 5th 607, 628, (2018) and *Rowland v. Christian*, 69 Cal. 2d 108, 113 (1968)). Further, these factors
 21 “must be evaluated at a relatively broad level of factual generality.” *Id.* (quotation omitted).

22 As an initial matter, Plaintiffs’ note that Copilot is a joint venture between GitHub and
 23 OpenAI (¶ 47), and GitHub’s own Privacy Statement defines “personal data” and includes
 24 “photographs, documents, or other files” and any “files you upload to our Service.” ECF No. 1-
 25 2. Plaintiffs specifically allege duties owed to them with respect to that personal data. Defendants
 26 owed a duty of care based on Defendants’ relationship to them. ¶ 231. Because Defendants
 27 possessed Plaintiffs’ personal data and had rights to control it, they owed various duties to
 28 Plaintiffs. *See Bass*, 394 F. Supp. 3d at 1039. Moreover, it is well established when a company

undertakes to collect and handle sensitive information from customers, a duty arises to handle that information with care. *Witriol v. LexisNexis Grp.*, No. C05-02392 MJJ, 2006 WL 4725713, at *8 (N.D. Cal. Feb. 10, 2006) (finding allegations that defendant, “[a]s custodians of the Representative Plaintiff’s and the Class Members’ personal and confidential information” “owe[d] a duty of care . . . to prevent access to such information by unauthorized third parties” sufficient). This duty applied to Defendants, who took the Plaintiffs’ information and then shared and distributed it to third-parties without Plaintiffs’ authorization. *See* ¶¶ 87–91, 148–54.

“The lack of reasonable care in handling of personal information can foreseeably harm the individuals providing the information” *See Bass*, 394 F. Supp. 3d at 1039. Defendants failed in their duties with respect to Plaintiffs’ information by using it for their own economic purposes in disregard for Plaintiffs’ rights.¹³ *See Sony Gaming Networks*, 996 F. Supp. 2d 942, 966 (S.D. Cal. 2014) (finding “legal duty to safeguard a consumer’s confidential information entrusted to a commercial entity” “well supported by both common sense and California . . . law.”); *Witriol*, 2006 WL 4725713, at *8. Defendants also owed Plaintiffs a general duty of responsibility for the results of one’s own actions. Cal. Civ. Code § 1714.

OpenAI’s last effort to defeat Plaintiffs’ claim rests on invoking the economic loss rule to claim Plaintiffs lack a negligence claim.¹⁴ Under California law, “[i]n the absence of (1) personal injury, (2) physical damage to property, (3) a ‘special relationship’ existing between the parties, or (4) some other common law exception to the rule, recovery of purely economic loss is foreclosed.” *Kalitta Air, LLC v. Cent. Tex. Airborne Sys., Inc.*, 315 F. App’x 603, 605 (9th Cir. 2008). The presence or absence of one factor is not decisive. *Id.* at 605–06. Of relevance here is the special relationship exception. Whether a “special relationship” exists is based on six factors:

¹³ OpenAI relies on *Schmitt v. SN Servicing Corp.*, 21-cv-03355-WHO, 2021 WL 3493754 (N.D. Cal. Aug. 9, 2021), but the allegations here are sufficient under *Rowland* to plead the existence of a duty. *See id.* at *6–7.

¹⁴ OpenAI claims that Plaintiffs’ negligence claims are not redressable. OpenAI Br. at 22–23 (citing *Huynh v. Quora, Inc.*, 508 F. Supp. 3d 633 (N.D. Cal. 2020)). As *Huynh* recognized, “[u]nder California law, appreciable, nonspeculative, present harm is an essential element of a negligence cause of action.” *Id.* at 649. Plaintiffs have alleged these harms. *See* § III.A.1, *supra*.

“(1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant’s conduct and the injury suffered, (5) the moral blame attached to the defendant’s conduct and (6) the policy of preventing future harm.” *J’aire Corp. v. Gregory*, 24 Cal.3d 799, 804 (1979).

First, by taking the code from GitHub, which was provided by users like the Plaintiffs, to train Codex and Copilot, and then to market Copilot to third parties, it was clearly intended for the transaction to affect Plaintiffs as it relies upon the body of work Plaintiffs made. ¶¶ 140–44, 149, 151, 152. Indeed, Codex and Copilot could not exist without the code provided by Plaintiffs and other class members on GitHub. **Second**, Plaintiffs publish code subject to licenses (which GitHub itself permits, ¶ 196), it was foreseeable that they would be harmed if those licenses were not honored. ¶¶ 149–50. As the injury would not happen unless Defendants chose to train their AIs on Plaintiffs’ code, that the Defendants themselves were the ones to offer the licenses, and with the rampant growth of AI products based on similar training, the last three *J’aire* factors are clearly implicated. ¶¶ 34, 78–81; *see also, e.g., Bass*, 394 F. Supp. 3d at 1039 (finding the absence of a duty of care “would create perverse incentives for businesses who profit off the use of consumers’ personal data to turn a blind eye and ignore known security risks.”) (citation omitted).

2. Plaintiffs Have Plausibly Pled a Claim for Civil Conspiracy (Count XI)

The elements of a claim for civil conspiracy are (1) the formation and operation of the common course of conduct and (2) damage to plaintiffs from acts committed in furtherance of the common design. *See Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 510–11 (1994). A civil conspiracy claim arises from concerted action in the commission of a tort, imposing joint and several liability “on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration.” *Fleites v. MindGeek S.A.R.L.*, ___ F. Supp. 3d ___, 2022 WL 4456077 (C.D. Cal. July 9, 2022).

Plaintiffs have adequately pleaded the commission of a number of underlying torts and violations of law, including claims for negligence, breach of contract, and statutory violations. *See*

§ III.E.1, *supra*. And Plaintiffs have pleaded each Defendant's role in the commission of the underlying torts. ¶¶ 8, 14, 82–84, 26–138 (OpenAI); 1, 5–7, 8, 10, 12, 14–15, 82–94, 125–38 (Microsoft/GitHub). Plaintiffs have alleged a common course of conduct, including that Defendants jointly developed, marketed and sold the Copilot product. ¶¶ 5–9, 11, 21–28. The Complaint specifies overt acts conducted in furtherance of their conspiracy. Based on these, Plaintiffs specifically allege that Defendants have worked together to create Copilot, deriving economic benefit therefrom. ¶¶ 236–38. The Complaint also specifies that Defendants did so in furtherance of a number of torts and violations of law. ¶ 239. That is all that is needed under California law. *See Applied Equip.*, 7 Cal. 4th at 510–11.¹⁵

3. Plaintiffs Have Plausibly Pled their Remaining State Law Claims

As to the remainder of Plaintiffs' state law claims, OpenAI's arguments do not differ substantially from Microsoft/GitHub's. For the reasons set forth in Plaintiffs' Opposition to Microsoft and GitHub's Motion to Dismiss and incorporated herein, each of OpenAI's arguments fail. *See id.*, § III.E.

Plaintiffs allege that OpenAI breached the terms of Plaintiffs' open-source licenses through their training and display of Plaintiffs' code without regard for the licenses. Microsoft/GitHub relied on training performed by OpenAI for Codex, which was then incorporated into Copilot. ¶¶ 47, 66, 84. OpenAI breached Plaintiffs' licenses by using their code for the training and operation of an AI system.

Plaintiffs also allege against OpenAI a count of unjust enrichment. Plaintiffs have alleged that they have invested substantial time and energy in creating the licensed materials, and that Defendants utilized their access to those materials to train their AI. ¶¶ 201–02. Further, Defendants directly profited and otherwise obtained benefits from their disregard of Plaintiffs' licenses through Copilot. ¶ 203. Plaintiffs have no adequate remedy at law. ¶ 206.

¹⁵ OpenAI asserts that there is a heightened pleading burden for a civil conspiracy claim. Not so. Rule 9 applies to fraud claims, not conspiracy claims. Moreover, evidence of the conspiracy lies in the hands of the conspirators, and Plaintiffs are not required to set forth all the details in their pleadings. *See Quinones v. Szorc*, 771 F.2d 289, 291 (7th Cir. 1985).

Plaintiffs allege violations of California’s Unfair Competition law (“UCL”). Plaintiffs allege numerous economic injuries sufficient to provide standing to sue under the UCL, namely that Plaintiffs invested substantial time and energy in creating licensed materials, that Defendants used those materials, and that Plaintiffs lost the value of their work as a result. ¶¶ 201–03. To the extent Open AI asserts that the UCL claims fails because Plaintiffs have not shown the absence of an adequate remedy at law (OpenAI Br. at 18), this claim is inconsistent with the pleadings. ¶ 210. Moreover, at this juncture, plaintiffs may proceed with claims for damages and claims for equitable relief as alternative remedies.¹⁶ *Espineli v. Toyota Motor Sales U.S.A., Inc.*, No. 2:17-CV-00698-KJM-CKD, 2018 WL 3769383, at *4 (E.D. Cal. Aug. 9, 2018) (finding “no basis in California or federal law for prohibiting the pursuit of alternate remedies at this early stage”).

F. Plaintiffs Should be Permitted Leave to Amend

Leave to amend is freely granted by courts in this district where the claim could be cured by additional factual allegations. *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995). Should the Court determine that dismissal should be granted, the Court should do so without prejudice and with leave to amend as to all claims.¹⁷

IV. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the motion to dismiss be denied, or in the alternative, that Plaintiffs be granted leave to amend their complaint.

¹⁶ Plaintiffs, in any event, can seek restitutionary disgorgement of profits and injunctive relief, which are paradigmatic remedies under the UCL. Cal. Bus. & Prof. Code § 17203; *Calhoun v. Google LLC*, 526 F. Supp. 3d 605, 636 (N.D. Cal. 2021) (citing *Clark v Superior Court*, 50 Cal 4th 605, 613 (2010)).

¹⁷ Plaintiffs do not concede claims under Section 1202(a) of the DMCA, or under Counts III, IV, V and IX have been inadequately pled. Plaintiffs nonetheless request leave to amend as to those Counts.

1 Dated: March 9, 2023

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